

Before the Copyright Royalty Board
Library of Congress
Washington, D.C.

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In the Matter of)	
)	
Notice and Recordkeeping for)	Docket No. RM 2005-2
Use of Sound Recordings under)	
Statutory License)	

Comments of the Digital Media Association

The Digital Media Association (DiMA), on behalf of its member webcasters, appreciates this opportunity to submit Comments in this supplemental inquiry concerning proposed regulations for notice and recordkeeping for services operating under the statutory sound recording digital performance license, 17 U.S.C. § 114, and multiple ephemeral recordings license, 17 U.S.C. § 112(e). DiMA members include many of the world's largest webcasters, such as AOL Radio, Live 365, MSN Radio, MusicMatch Radio and Launchcast at Yahoo! Music. Over the last several years, DiMA and its members have participated actively in prior Copyright Office inquiries and proposed rulemaking proceedings with respect to Notice and Recordkeeping.¹ We therefore are pleased to address below the questions posed by the Board in this proceeding.

Consistent with the comments of DiMA and its members in these prior proceedings, DiMA shares the view of other webcasters and transmitting entities: any information to be submitted to SoundExchange should constitute a minimum data set that enables identification of the sound recordings performed and the number of compensable performances of such sound recordings within a relevant, limited time period. Streamlining recordkeeping requirements best satisfies both the statutory requirement of reasonable notice and the goal of minimizing administrative costs and burdens imposed on all parties by the statutory license.

With respect to the format in which the data is to be provided to SoundExchange, DiMA has worked constructively with the Recording Industry Association of America ("RIAA") and SoundExchange to develop and jointly submit a format for electronic submission of data. DiMA believes that the proposal as set forth by SoundExchange impose reasonable and acceptable technical data format requirements. These technical format requirements are reflected in the April 27, 2005, Notice of Proposed Rulemaking, and are addressed in sections D-E and H-K in the Notice of Inquiry.

DiMA comments below on the factual questions relating to Report Delivery and on the legal and policy questions posed by the Copyright Royalty Board.

¹ See, Comments of DiMA and Comments of Yahoo! Inc. in Notice and Recordkeeping for Use of Sound Recordings under Statutory License, Docket RM 2002-1.

Report Delivery

DiMA members find the current methods of delivery to be satisfactory. Notwithstanding, DiMA believes that a web-based system for filing reports with SoundExchange would yield greater benefits. Such web-based systems are increasingly common for vendor-supplier interactions in the commercial world, where customers can easily place and check the status of orders and review past orders, using web-based searching of the supplier's database.

A good example of the capabilities enabled by web-based submissions and searching in the public sector is the Electronic Comment Filing System of the Federal Communications Commission, <http://www.fcc.gov/cgb/ecfs/>. Users of ECFS file comments directly in the relevant dockets by filling in a form that "tags" the submission. Attachments are uploaded in specified common formats. Where feasible, the ECFS converts attachments from one file format to others. Users can search submitted comments by entering into a web-based form the specified search variables, such as types of comments within a particular docket or by name of the filer. The stored documents then can be reviewed, retrieved, copied or printed.

Similarly, here, web-based submissions could potentially ease some of the burdens on the parties. Using a data entry form, submissions could be tagged with information that otherwise is required by SoundExchange to be included on labels or in the data itself. Data stored by SoundExchange readily could be searched and retrieved by the entity that submitted the reports. This would ensure proper record retention and facilitate resolution of any questions or disputes between the webcaster and SoundExchange. Therefore, although DiMA members have no opposition to continuing the delivery methods currently agreed-upon with SoundExchange, DiMA supports submission of reports via a web-based interface so as to further simplify the data entry, storage and retrieval processes.

Legal and Policy Questions

1. *Did Congress, in 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4), require the Copyright Royalty Judges to prescribe particular formatting and delivery requirements at the level of detail described in the April 27, 2005, notice of proposed rulemaking? Is there some relevant set of Internet conventions or practices that could guide the Board in setting data submission standards here?*

DiMA understands these statutory sections do not require the Copyright Royalty Judges not to prescribe formatting requirements at a "micro" level of detail, but to permit the promulgation of detailed regulations -- *if* such specificity will promote the purposes of the statute. As DiMA observed above, to balance the administrative burdens among all parties to the statutory scheme, the regulations should require licensees to provide only the minimum data necessary to facilitate allocation and distribution of royalties for the beneficiaries of the statutory license.

The scope of the regulatory authority granted to the Copyright Royalty Board is not unbounded. Congress provided for a sound recording performance statutory license in the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act of 1998, and the Small Webcaster Settlement Act of 2002, to stimulate the growth of business models built on nascent technologies. Congress made clear its intention that **the license should be practical in its implementation and affordable for a multitude of webcasters – and that it should not be available only “in principle” or to just a few.**

Thus, the statute explicitly states that these notice and recordkeeping requirements must be “reasonable.” This express requirement of reasonableness, together with the underlying purpose of enabling the licensing of large numbers of webcasters, implies that the costs of licensing administration (as well as the royalty rate) must not impose unreasonable burdens and cost upon the licensees.

As DiMA, Yahoo! and many other webcasting entities have attested in prior proceedings, administrative costs for recordkeeping can rival the costs of the royalty itself. Any recordkeeping regulations must take into account these costs and burdens for all licensees. The Board should adopt recordkeeping requirements that are not overly specific or limiting, and that do not impose onerous obligations that would either threaten existing webcasters’ continued use of the statutory license or erect a barrier to entry by new webcasters.

Rather, DiMA urges that the Board exercise its authority primarily to ensure compatibility of the SoundExchange system with data collection systems most commonly used in the marketplace. By facilitating compatibility, the Board will provide the greatest flexibility to licensees of varying sizes and means, and will provide incentives to system vendors to develop affordable systems that are compatible with these industry standard products. Such interoperability ultimately will reduce the costs for all parties, streamline the administrative burdens of recordkeeping and processing, and enhance the accuracy of the data as submitted to SoundExchange.

2. *Could a system of webcast sampling, analogous to the sampling performed by performing rights societies in the context of broadcasting, meet the record-of-use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4)?*

DiMA supports the use of sampling to fulfill the statutory recordkeeping obligation of “reasonable” notice as the best solution for the needs of all parties. Indisputably, “perfect” recordkeeping is impossible. Requiring census data from hundreds of webcasters would track tens of millions of performances per month. Resolving statistically insignificant inaccuracies among these performances in the pursuit of “perfection” is prohibitively expensive. Recordkeeping, in the experience of DiMA members, follows the adage how solving the last 10 percent of a problem incurs 90 percent of the cost. DiMA believes it makes no sense to require every webcaster to spend

tens of thousands of dollars chasing down discrepancies that may amount to just a few cents more or less.

Sampling, though "imperfect," historically produces reasonably accurate results and reliable proxies that fairly compensate rightholders. Decades of experience by performing rights societies demonstrate how sampling mechanisms result in payments to both star performers and lesser-known artists in a manner reasonably proportional to actual airplay. By obtaining time-limited samples of channels across a variety of services (including both the most popular and niche music stations, and larger and smaller webcasting entities), sampling can achieve an accurate representation of the sound recordings actually performed over the compensable period.

Sampling benefits all parties. For the webcaster, sampling over a limited period of time imposes far less of a burden than maintaining a massive "comprehensive" database of all performances. For SoundExchange, sampling will result in more accurate data of a more manageable size. Using well-accepted extrapolation techniques, producers and performers will receive compensation that reasonably approximates the results that would be obtained through a "perfect" data collection. Moreover, the administrative time and cost savings as a result of sampling would likely result in quicker and higher payments to the producers and performers. These cost savings should compensate these beneficiaries for the types of minor discrepancies that ordinarily would be encountered through sampling rather than census data collection.

3. *Under the provisions of any final rule adopted to implement the notice and record of use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4), either copyright owners (in the form of their agent, SoundExchange) or licensees will be burdened with having to change their existing data systems. From a legal and a policy perspective, on whom is it most appropriate to place these burdens? Is the court's discussion in Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144, 1154-55 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) ("depriv[ing] copyright owners of increased remuneration for the exploitation of their works by showing that some * * * operations will become unprofitable is * * * unsound and unjust") pertinent to this inquiry?*

The Board should not view the *AMOA* case (involving jukebox royalty payments) as a relevant precedent for this proceeding, because of the differences between Internet webcasters and jukebox suppliers under the Section 114(f)(2)(B) factors; i.e., promotional value of airplay, enhancement of sound recording companies' other revenue streams, creative contribution, technological contribution, capital investment, cost and risk.

There can be no fair comparison under the Section 114 factors between purchasing a few dozen 45 rpm records for a jukebox and creating and programming hundreds of internet webcast radio channels:

- Every webcaster of any substance invests millions of dollars and thousands of hours on programming alone. Webcasters program tens of thousands of sound recordings each month in multiple genres, to create a listening experience more compelling than broadcast radio.
- Many webcasters link to informational content about the sound recordings and artists over and above the mere name of the song, artist and label.
- Webcasters add “buy button” opportunities to purchase the recordings.
- Whereas jukeboxes generally play only “top 40” recordings, much of webcasting focuses on exposing performers and sound recordings that rarely would receive airplay via any other medium. (And, by contrast, no additional creative effort is required on behalf of the sound recording producers or performers to make the statutorily licensed transmissions possible.)

This extraordinary level of investment and creativity involved in programming webcast stations stands worlds apart from the meager factors at issue in jukebox case, and demonstrates why as a matter of public policy the administrative burdens and costs of recordkeeping should be balanced in favor of a vital and expanding webcasting industry.

DiMA believes that the more relevant precedent upon which the Board should rely is the initial notice and recordkeeping proceeding under the Digital Performance Right in Sound Recordings Act, with respect to new cable and satellite digital music services. There, the Copyright Office specifically adopted several data reporting requirements in the Interim Determination because they comported with the relevant services’ existing methods of doing business, and did not compel the services to either change those methods or undertake unacceptable added expense and burden.²

For example, in the Interim Determination those services voluntarily agreed to produce full intended playlist information because (a) they had a limited number of channels that was not likely to expand in the foreseeable future, and (b) producing an unedited complete data dump from their industry-standard scheduling software package was cheaper and easier, for them, than producing sample data. Importantly, the Copyright Office accepted “intended” playlist information rather than “actual” playlist information – i.e., what the services had scheduled for play as opposed to what actually had been played – because the added expense of tracking actual plays was not justified by the relatively minor variation in data (perhaps as much as one song per hour).

This allocation of burden and expense was particularly appropriate because, at that stage, and much like webcasters, these nascent services had not yet become profitable, and so could not readily afford to undertake additional costs that would further delay their estimated break-even date. Thus, following historical precedent, the Board

² Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998).

should promulgate regulations that work within the current data operations of the existing webcasting services (in their several different business and programming models), and adopt the least expensive and least burdensome alternatives in the new regulations.

Further, any policy analysis of the relative burdens of recordkeeping must be informed by several additional factors. First, the Board should consider the level of burdens ordinarily imposed by recordkeeping in analogous industries. For example, webcasting services already incur certain levels of burdens and expense in compliance with the sampling recordkeeping for performing rights societies in connection with performance of musical works. Conversely, right holders under those performance licenses (including many of the performers entitled to receive sound recording royalties) historically have borne a certain level of administrative expense with respect to the distribution of royalties. To the extent that the burdens imposed by the Board's regulations are similar to those imposed with respect to music reporting, and are based upon reasonable sampling techniques, the Board should consider that the burdens have been fairly allocated.

Second, the Board should recognize that the costs of changing the SoundExchange system may have long-term benefits for all licensees, whereas the costs of changing individual webcaster systems may merely impose a dead weight cost with no further benefit. Specifically, several of the proposed changes could, in DiMA's view, be obviated if SoundExchange were to provide for use by all webcasters a database of sound recordings.

DiMA and its members have long been perplexed by the apparent expectation, contrary to standard information industry practices, that webcasters should aggregate and maintain for the benefit of SoundExchange data concerning the sound recordings themselves. SoundExchange, its Board and its members create and control all of the information that goes into this database. It seems inexplicable for SoundExchange to complain about the costs of cleaning up sound recording data that have to be entered manually by hundreds if not thousands of individual transmitting entities, when SoundExchange could obviate this problem by simply making available to the webcasters the data that SoundExchange and its members own. If SoundExchange gave webcasters access to the database records that already describe these sound recordings, it would be a simple matter to create records of use by populating an additional field showing the number of performances during the relevant time frame.

Furthermore, this would eliminate any claimed need for redundant data fields on the notion that webcast services are likely to make mistakes in data entry, and the SoundExchange system might need to review many different data fields to ensure accuracy with respect to royalty allocations. Seeking more data susceptible to the same errors in data entry only further compounds the problem that SoundExchange wants to solve. To obtain precise song and album identification data reports, it is more logical and sensible for SoundExchange to provide that data in the industry-preferred format to the webcasters.

Indeed, it is standard practice in the field of information science for the owners of necessary data to provide accurate databases to information users. In this case, SoundExchange should provide accurate information on the sound recordings to the services; and the services should augment that data with accurate information identifying the services and counting performances. In this manner, there will be few, if any mistaken song identifications. Consequently, there will be less ongoing administrative expense to SoundExchange, the license beneficiaries, and the webcasters.

Therefore, to adopt regulations that reasonably, effectively and efficiently implement the statutory reporting requirements, the Copyright Royalty Board should require SoundExchange to provide the services with its database of information concerning the sound recordings. This database should include blank fields to be filled in, as appropriate, by the licensed services. Data to be provided by the services should be no greater than that necessary to identify the name of the service, and state the number of performances made of each sound recording during the relevant payment period.

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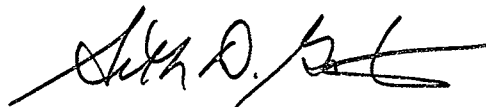
DiMA and its members look forward to participating further in this proceeding. We remain available to address any questions, comments or concerns the Copyright Royalty Board may have.

Respectfully submitted,



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